IN THE

Supreme Court of the United States.

October Term, 1873.

ADOLPH GUTMAN & ANDREW STUART
vs.
THE UNITED STATES.

No. 157.

On Appeal from the Court of Claims.

Brief for Plaintiffs and Appellants.

July 17, 1870, plaintiffs sued to recover from the United States $4,480, the value of 56 head of oxen, captured by a band of hostile Indians, and of which no part was ever recovered. One of the petitioners at the time of the capture was the owner of the said oxen, (Adolph Gutman,) and the other petitioner, Andrew Stuart, was the contractor with the Government for the transportation of supplies by means of the said oxen, (which had been regularly inspected and received by the proper officer of the Quartermaster's Department,) from Fort Leavenworth, Kansas, to Fort Union, New

Mexico Territory; and the attack and the capture of the property were made in the month of July, 1864. The contract with the Government is made part of the petition, and petitioners allege full compliance with all the stipulations therein contained. That when the oxen were taken they were in the military service of the United States, who are liable to pay the reasonable value of the oxen at the time they were taken, under act of 3d March, 1849, (9 S. L., 415.) Petitioners further allege that the Third Auditor of the Treasury refuses to settle all claims of this class upon the ground that property employed in the transportation of military supplies upon the plains, under transportation contracts, is not in the military service of the United States, within the meaning of said act.

Rec., p. 1.

The Attorney-General demurred. (Rec., p. 2.) The demurrer was sustained, with the usual *pro formâ* leave to amend within thirty days. Afterwards, the plaintiffs, not availing themselves of this permission, the court dismissed the petition, (Rec., p. 3,) and plaintiffs appealed.

The act of Congress, stripped of portions immaterial to this case, reads as follows: "Any person who has sustained damage "by the capture by an enemy of any ox, &c., while such "property was in the military service of the United States, "either by impressment or contract, * * * and any per-"son who has lost or had destroyed by unavoidable accident "any ox, &c., while such property was in the service afore-"said, shall be allowed and paid the value thereof at the time "he entered the service: *Provided*, It shall appear that such "loss, capture, abandonment, destruction, or death, was with-"out any fault or negligence on the part of the owner, and

" while it was actually employed in the service of the United " States." (9 S. L., 415.) The title of this act is " to pro- " vide for the payment of horses and other property lost or " destroyed in the military service of the United States. And by act of 3d March, 1863, (12 S. L., 743,) the provisions of the quoted section were extended to steamboats and other vessels, and railroad engines and cars. Both acts are evidently *in pari materiâ*.

The Government has endeavored, in its legislation, to remove from its contracts with its own citizens one disorganizing and hazardous element, which, if permitted to continue, would entirely destroy all equality between the contracting parties. Its language is: " Deal with us not at arms' length, " but in entire confidence that, against the unknown risks of " destruction of your property by the foe, we will fully insure " you; *provided* you submit beforehand the examination, ap- " proval, and acceptance of your property to our duly-author- " ized officers."

ASSIGNMENTS OF ERROR.

The Court of Claims erred on the following grounds:

First. In making the contract between the plaintiffs and defendants operate in a manner not intended by the parties to it;

Second. In making the said contract operate in a manner neither expressed nor implied in the terms thereof;

Third. In deciding that plaintiffs had renounced the benefits of an act of Congress without any evidence of such renunciation;

Fourth. In sustaining the demurrer of the United States.

The meaning of the word "service" is "military duty by "land or sea, as military or naval service."

Campbell's Mil. Dict., quoted in Webster, *verbo* Service.

Everyone who employs a common carrier has the carrier in *service.* It is the well-known contract in law—*locatio operis mercium vehendarum;* and is a branch of the letting out of labor or industry. The United States in this case had the plaintiffs as much in their employ, by virtue of the contract made part of the petition, as if they had hired them to do work in the office of the Third Auditor of the Treasury Department.

"Military—*engaged in the service of soldiers or arms.*"—*Webster.*

What can be more clearly classed under "*military,*" than the services of a carrier, transporting supplies for an army under a contract with an assistant quartermaster of the United States army, himself a captain? No *civilian* could bind the Government in such a contract.

2 S. L., 536, sec. 5.
The Fremont cases, 2 C. Claims R., 1.

The services are not only "military," but no army and no arms can be wielded without them. They are indispensably necessary. The things transported are "*military stores and* "*supplies.*"

See Contract, Rec., p. 3.

All service to the Government is divided into "*military*" and "*civil.*" And if it be admitted that he was in the service of the United States, he could not manifestly have been punished for any crime or misdemeanor under article 2, section

4, of the Constitution; and it is yet clearer that under a drum-head court-martial, he might be hung or shot, in the most summary manner.

Story Const., §§ 790, 791.
See section 16, act of 17th of July, 1862, 12 U. S. Statutes at Large, p. 596.

"But when did he enter the service?" The very moment the contract was signed by both parties and the service began: just as in the case of a hired servant.

See 12 S. L., 411, 597.
Gill *vs.* U. S., 7 C. Cl'ms R., 528.

Both the acts of 3d March, 1849, (9 S. L., 415,) and 3d March, 1863, (12 S. L., 743,) entered into and formed a part of plaintiffs' contract. "*But the oxen were not in the military* "*service of the United States,*" says the Third Auditor. We submit the Third Auditor is in error.

A steamboat chartered to carry soldiers or supplies through a hostile country, or a locomotive employed for a similar service, are paid for by the Government, when sunk or destroyed by the enemy. They may be owned by citizens who never came near the seat of war; never contracted with the Government; never saw a quartermaster to know him; never knowingly entered either the civil or military service of the Government. Or, the owners may be married women, minors, or insane and interdicted persons. Are these to go without payment for their property, used up and destroyed in military operations?

Or, the owners may be a railroad corporation, a pure juridical creation, which could not by possibility enter the military service at all. Must it go without pay under the acts? All

locomotives *in use* are owned by corporations. Who ever heard of an individual owning one? The act reads, "*any* "*person who shall sustain damage by the capture or destruc-* "*tion by an enemy*," &c. If it be required, as a condition precedent to his recovery, to "enter the service," the act is emasculated of its usefulness. "By the two sections" of the act "it is manifest that Congress intended to pay for all such "property which might be lost or destroyed *in the actual ser-* "*vice of the United States.*"

Powell *vs.* United States, 1 C. Claims Rep., 401.

But the demurrer is sustained on the ground that by the express terms of the tenth article of the contract the risk is to be borne by the claimant.

Your Honors will notice that this is the only point really decided by the lower court in this case.

6 Ct. Cl'ms Rep., 111.

The language of the tenth article is as follows: "That the "said Andrew Stuart shall be furnished with a suitable escort "for the protection of the supplies, should he be required to "transport in any one train a less quantity than 125,000 "pounds; but whenever required to transport 125,000 pounds, "or more, then no escort shall be furnished."

The Third Auditor of the Treasury, it will be observed, placed his decision on grounds entirely different from those of the Court.

The singularity of the provisions of the tenth article will strike an inquisitive mind at once. Why should supplies of a less weight than 125,000 pounds require an escort, whilst more than that weight should require none? The court below thought that this provision was introduced for the protection of

the Government; and that in all cases when claimants were required to transport 125,000 pounds or more, the claimants *took the risk* [of loss by the enemy] by the express terms of the contract as above quoted. An ordinary mind, in striving for the true meaning of the contract, would probably interpret it thus: "When the wagon train is transporting less than "125,000 pounds, there will probably be an insufficient num- "ber of men attached to the train to protect it from the sav- "ages; but where the train is to carry over that weight, there "will be an ample quantity of defendants for any reasonable "emergency."

But it is by no means necessary to resort to interpretation for the true meaning of this contract. The language of it is plain. The escort, in all cases, is "*for the protection of the* "*supplies.*" Now, whether the terms of the contract be construed *extensively*, and thus made to cover the military supplies, with the wagons, harness, cattle, &c., or *closely*, and confined strictly to the supplies, is immaterial, if the provision was inserted for the protection of the United States. It is altogether a forced and unnatural construction to fasten upon the claimants a liability for an unusual and extraordinary risk for amounts over 125,000 pounds, when for a smaller risk they required an escort. Why they should assume a greater and avoid a smaller risk is unaccountable to us, unless the contract be construed to mean *the risk, inappreciable in money, to life and limb* of the transporters, and not the risk to the animals carrying the supplies. No doubt, the provisions of the acts (9 S. L., 415; 12 S. L., 743) entered into the contract between claimant and the United States, and formed a part thereof; and whilst this is admitted by all parties, it is contended that the benefit afforded by these acts to this claimant has been renounced by him, in this tenth article of his contract. But if this be so, it should not be left to construction, but appear in clear, unmistakable language of the contract.

Now, the conclusion of the Court of Claims in this case is based upon the affirmative of that very proposition which we have discussed herein, and which meets the express denial of the Attorney-General. He says: "*The claimant was not in "the military service of the United States.*" If the contradictory of this proposition be true; and if, in a case of transportation under 125,000 pounds, the escort does not save the United States from liability for destruction by the enemy, it must be because it is so stated in the contract. But it is clearly not so stated in the contract. We draw two conclusions from this: First, that the operation of the two statutes (9 S. L., 415, and 12 S. L., 743) was not at all in the minds of the parties when the tenth article of the contract was prepared, and *Iniquum est perimi de pacto id de quo cogitatum non est;* and, second, that if the language of the contract clearly expressed the doctrine alleged, the contradictory of it could not be affirmed in cases where the transportation was for 125,000 pounds and over. It would be an erroneous application of the maxim, *qui dicit de uno, de altero negat*, because it would ignore the intention of the parties, which was not "to save money," but "to *secure transportation* as safely "and conveniently as possible." And if these views are correct, the judgment of the Court of Claims must be reversed.

Of course, we do not mean to exclude from your cognizance that, in point of fact, the supplies on the occasion in question did actually exceed 125,000 pounds. We desire to meet the demurrer in the directest way. The act of March 3, 1849, (9 S. L., 415,) sec. 2, expressly provides for cases "where the "risk to which the property would be exposed was agreed to be "incurred by the owner." In such cases, the United States pays no damages. But the act of Congress puts it in the shape of an exception; and exceptions are all *stricti juris*. To bring the claimant here under the operation of the excep-

tion, there should be no doubt about the fact that he actually *agreed to take the risk;* but this, as we have shown, cannot be found in the language of the contract, nor does it necessarily result from the intention of the parties, as the contract stands. If, without the tenth article, the United States would be bound to pay for the oxen herein sued for, we contend that, with its insertion, the same liability still exists; and that nothing contained in this article ten is inconsistent with this view. "Without it (this article ten) claimants stood insured against "capture to the extent that they should be paid for the actual "value of the property which might be taken from them. "This would, however, be only a partial indemnity; a capture "of a train would result in a loss of the freight-money, and it "might be difficult or impossible to replace the animals, so "that future earnings would be imperilled. These dangers "furnished a sufficient inducement for them to desire an escort, "and it was therefore stipulated that one should be fur- "nished for small trains, but not for large trains; the Govern- "ment thereby risking the loss of its stores, and the contract- "ors the loss of their freight-money."

With all due submission, we think, by sustaining the demurrer, the Court of Claims assumed a ground not taken by the United States, and made the contract operate in a manner neither intended by the parties nor expressed in its terms; and therefore that the judgment appealed from should be reversed.

Respectfully submitted.

DURANT & HORNOR,
Attorneys for Appellant.

WASHINGTON, D. C., *September* 17, 1873.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

ADOLPH GUTTMAN, AND ANOTHER, APPELLANTS, *vs.* THE UNITED STATES. } No. 157.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

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APPEAL FROM THE COURT OF CLAIMS.

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STATEMENT.

This is an appeal by the claimants from a judgment of the Court of Claims allowing a demurrer to their petition seeking to recover for the capture of fifty-six head of oxen, employed in drawing a train of wagons from Fort Leavenworth to Fort Union, New Mexico, on the 12th of July, 1864, by a band of hostile Indians. The train of wagons was employed under a contract between Stuart, one of the claimants, and Captain Hodges, assistant quartermaster, which is set forth in the Record, (pp. 2–5,) whereby Stuart agreed to transport all such military stores and supplies as might be offered or turned over to him for transportation from Forts Leavenworth and Riley to Fort Union, or any other depot that might be designated in the Territory of New Mexico.

By Article X of the contract, (Rec., pp. 4–5,) it is provided "That the said Andrew Stuart shall be furnished with a suitable escort for the protection of the supplies, should he be required to transport in any one train a less

quantity than one hundred and twenty-five thousand pounds, but whenever required to transport one hundred and twenty-five thousand pounds, or more, then no escort shall be furnished."

There is no allegation in the petition that the claimants were transporting more or less than one hundred and twenty-five thousand pounds.

ARGUMENT.

This suit seems to be brought under section two of the act of 1849, ch. 129, (9 U. S. Stat., 415,) which is as follows:

"That any person who has sustained, or shall sustain, damage by the capture or destruction by an enemy, or by the abandonment or destruction, by the order of the commanding general, the commanding officer, or quartermaster, of any horse, mule, ox, wagon, cart, boat, sleigh, or harness, while such property was in the military service of the United States, either by impressment or contract, except in cases where the risk to which the property would be exposed was agreed to be incurred by the owner; and any person who has sustained, or shall sustain, damage by the death or abandonment and loss of any such horse, mule, or ox, while in the service aforesaid, in consequence of the failure on the part of the United States to furnish the same with sufficient forage, and any person who has lost, or shall lose, or has had, or shall have, destroyed by unavoidable accident, any horse, mule, ox, wagon, cart, boat, sleigh, or harness, while such property was in the service aforesaid, shall be allowed and paid the value thereof at the time he entered the service: *Provided*, It shall appear that such loss, capture, abandonment, destruction, or death, was without any fault or negligence on the part of the owner of the property, and while it was actually employed in the service of the United States."

It is submitted that there are several decisive answers to the claimants' suit.

1. The case does not come within the statute, inasmuch as this was not a destruction by an enemy.

From all that appears, the destruction was by a party of mere marauders, who, although sufficient to render the transportation dangerous, and consequently making it proper that provision should be made for an escort, were not, either in a technical or popular sense, enemies of the United States.

The peculiar relation of the Indian tribes to the United States has been so often discussed that it is unnecessary now to enlarge upon it. See the *Cherokee Tobacco*, 11 Wall., 616, and cases cited on p. 619.

If this statute can be so extended as to cover a party of Indian marauders, it might be so extended as to make the Government insurers against all seizures by marauders or highwaymen of wagons belonging to contractors transporting supplies to the western forts. It is apparent from the entire statute taken together, that the losses for which the Government provides an indemnity, are those which occur in war.

2. Be this as it may, it is submitted that the case does not come within the statute, because the claimants were not in the military service of the United States.

The statute of 1849 is entitled "An Act to provide for the payment of Horses and other Property lost or destroyed in the Military Service of the United States."

The first section provides for payment for horses which have been used by officers, militiamen, volunteers, rangers, or cavalry, and which have been killed in battle, or wounded in battle and died afterwards, or abandoned by order of a superior officer, &c. Then follows section two above cited. Section three provides for the adjustment of these claims. Section five, that parents or guardians are to be allowed for the loss of horses provided for minors.

Taking the whole together, it is submitted that its provisions are strictly confined to losses incurred by persons in the military service of the United States. The claimants were not in any sense in that service. Their train of wagons was not a military train accompanying the Army, but only a train employed in transporting goods as an express company might have transported

them from one military post to another. Contractors are not in the United States service.

Osborne vs. *United States Bank*, 9 Wheat., 859, 860, 867.

Whitehouse vs. *Langdon*, 10 N. H., 331.

3. But admitting that this belongs to a class of claims that falls within the act of 1849, nevertheless the demurrer was properly sustained in the court below, because it does not appear that the claimants were transporting a less quantity than one hundred and twenty-five thousand pounds, in which case only an escort was to be furnished for the protection of the supplies.

The proper construction of this article of the contract, requires that the claimants should be considered as their own insurers whenever transporting one hundred and twenty-five thousand pounds or more; and, in order to recover from the Government, they must show in their petition that the case was one falling within the conditions on which the Government agreed to furnish a suitable escort for the protection of the supplies.

C. H. HILL,
Assistant Attorney-General.

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